United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1518

To be argued by
HAROLD JAMES PICKERSTEIN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1518

B P/S

UNITED STATES OF AMERICA,
Appellant,

—v.—

WILLIAM TURNER,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLANT

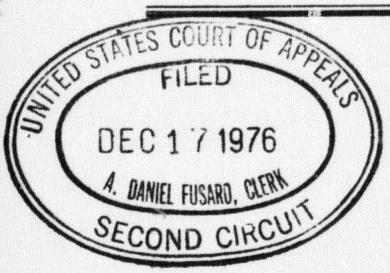

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TABLE OF CONTENTS

TABLE OF CASES

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Statement of the Case

On December 12, 1974, a federal Grand Jury sitting at New Haven, Connecticut, returned a true bill of indictment (N-74-124) charging the defendant William Turner and Eli Pinoci with violations of 18 U.S.C. Section 371 and 542. The indictment charged Turner with three counts of making false declarations to United States Customs concerning the entry into the United States of quantities of amygdalin purissimum, and charged Pinoci and Turner with conspiring with each other to make these false statements to United States Customs.

On May 27, 1975, Turner entered pleas of not guilty to each count of the indictment. Pinoci remains a fugitive.

On July 11, 1975, Turner moved to suppress all evidence that had been discovered during a search of Turner's residence in California on June 11, 1974.

On October 5, 1976, Turner's motion to suppress was granted (Zampano, J.). Judge Zampano's decision granting the motion to suppress is as yet unreported.

On October 28, 1976, pursuant to 18 U.S.C. Section 3731, the United States filed a Notice of Appeal along with a certification that the appeal was not being taken for purposes of delay and that the evidence suppressed is a substantial proof of facts material to the proceedings.

Statutes Involved

18 U.S.C. § 371

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons—any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. § 541

Whoever knowingly effects any entry of goods, wares, or merchandise, at less than the true weight or measure thereof, or upon a false classification as to quality or value, or by the payment of less than the amount of duty legally due, shall be fined not more than $5,000 or imprisoned not more than two years, or both.

F. R. Crim. P. 41(c)

(c) Issuance and Contents. A warrant shall issue only on an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant. If the federal magistrate or state judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the federal magistrate or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses he may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place named for the property specified. The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. It shall designate a federal magistrate to whom it shall be returned.

Proposed amendment to F.R. Crim. P. 41; transmitted by Supreme Court to Congress, April 26, 1976; effective date delayed until August 1, 1977. As set forth in 96 S.Ct., Advance Sheet No. 5, at 4-5 (1976).

(a) Authority to issue warrant. A search warrant authorized by this rule may be issued by a federal magis-

trate or a judge of a state court of record within the district wherein the property sought is located, upon request of a federal law enforcement officer or an attorney for the government.

* * * * *

(c) Issuance and contents.

(1) Warrant upon affidavit. A warrant shall issue only on an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant. If the federal magistrate or state judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the federal magistrate or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses he may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place named for the property specified. The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. It shall designate a federal magistrate to whom it shall be returned.

(2) Warrant upon oral testimony. When the circumstances make it reasonable to do so in the absence of a written affidavit, a search warrant may be issued upon sworn oral testimony of a person who is not in the physical presence of a federal magistrate provided the federal magistrate is satisfied that probable cause exists for the issuance of the warrant. The sworn oral testimony may be communicated to the magistrate by telephone or other appropriate means and shall be recorded and transcribed. After transcription the statement must be certified by the magistrate and filed with the court. This statement shall be deemed to be an affidavit for purposes of this rule.

(A) Method of issuance. The grounds for issuance and the contents of the warrant shall be those required by subdivision (c)(1) of this rule. Prior to approval of the warrant, the magistrate shall require the federal law enforcement officer or the attorney for the government who is requesting the warrant to read to him verbatim, the contents of the warrant. The magistrate may direct that specific modifications be made in the warrant. Upon approval, the magistrate shall direct the federal law enforcement officer or the attorney for the government who is requesting the warrant to sign the magistrate's name on the warrant. This warrant shall be called a duplicate original warrant and shall be deemed a warrant for purposes of this rule. In such cases, the magistrate shall cause to be made an original warrant. The magistrate shall enter the exact time of issuance of the duplicate original warrant on the face of the original warrant.

(B) Return. Return of the duplicate original warrant and the original warrant shall be in conformity with subdivision (d) of this rule. Upon return, the magistrate shall require the person who

gave the sworn oral testimony establishing the grounds for issuance of the warrant, to sign a copy of it.

Cal. Penal Code § 1523

Search warrant defined. A search warrant is an order in writing, in the name of the people, signed by a magistrate, directed to a peace officer, commanding him to search for personal property, and bring it before the magistrate.

Cal. Penal Code § 1526

(a) The magistrate may, before issuing the warrant, examine on oath the person seeking the warrant and any witnesses he may produce, and must take his affidavit or their affidavits in writing, and cause same to be subscribed by the party or parties making same.

(b) In lieu of the written affidavit required in subdivision (a), the magistrate may take an oral statement under oath which shall be recorded and transcribed. The transcribed statement shall be deemed to be an affidavit for the purposes of this chapter. In such cases, the recording of the sworn oral statement and the transcribed statement shall be certified by the magistrate receiving it and shall be filed with the clerk of the court. In the alternative in such cases, the sworn oral statement shall be recorded by a certified court reporter and the transcript of the statement shall be certified by the reporter, after which the magistrate receiving it shall certify the transcript which shall be filed with the clerk of the court.

Cal. Penal Code § 1528

(a) If the magistrate is thereupon satisfied of the existence of the grounds of the application, or that there is probable cause to believe their existence, he must issue a search warrant, signed by him with his name of office, to a peace officer in his county, commanding him forthwith

to search the person or place named, for the property or things specified, and to retain such property or things in his custody subject to order of the court as provided by Section 1536.

(b) The magistrate may orally authorize a peace officer to sign the magistrate's name on a duplicate original warrant. A duplicate original warrant shall be deemed to be a search wararnt for the purposes of this chapter, and it shall be returned to the magistrate as provided for in Section 1537. In such cases, the magistrate shall enter on the face of the original warrant the exact time of the issuance of the warrant and shall sign and file the original warrant and the duplicate original warrant with the clerk of the court as provided for in Section 1541.

Questions Presented

1. Would the Courts of the State of California suppress the evidence seized in this case?

2. Should the federal exclusionary rule be applied in this case?

Statement of Facts

On June 11, 1974, as a result of a lengthy investigation of Turner by agents of the Food and Drug Section, California Health Department, and special agents of the United States Customs Agency Service, an application was made for the issuance of a search warrant for Turner's residence, located at 53 East Shasta, Chula Vista, California. (Appendix 7A.) This application was made after Turner and an accomplice, one Winifred Davis, had been arrested by California state authorities for violation of California Health and Safety Code sec-

tion 1707.1, and for grand larceny, in violation of California Penal Code section 487. (App. 27A.) The investigation into Turner centered about his involvement in the illicit distribution of laetrile, or amygdalin, an alleged cancer cure, the distribution of which is prohibited by California Health and Safety Code section 1707.1. The investigation involved not only agents of the California Health Department but also local police officers, members of the San Diego County Sheriff's Office, and Special Agents of the United States Customs Agency Service.

At approximately 9:00 p.m. on June 11, 1974, Judge Kenneth Johns of the San Diego Municipal Court was telephoned at home and was requested to issue a search warrant under the provisions of California Penal Code section 1526(b). A conference telephone call was set up, with Sharon Dalton, a special operative of the California Health Department, Special Agent Seth Nadel, United States Customs Agency Service, and Deputy District Attorney Charles Bell, San Diego County District Attorney's Office, present at the Chula Vista Police Department, and Judge Johns present at home. (App. 14A.) The telephone call was recorded. Judge Johns placed Dalton and Nadel under oath, and they were examined by the judge and the deputy district attorney with respect to the search warrant application. (App. 14A-33A.)

After establishing that there was sufficient probable cause for the issuance of the search warrant, Judge Johns directed Special Agent Nadel, one of the affiants, to sign the judge's name onto a duplicate original warrant. This was done (App. 28A), and the warrant was served by a Chula Vista police officer. (App. 9A.) The actual search was conducted by local police and sheriff's deputies, Customs Agents, and Dalton. A total of 79 separate groups of items were seized, including invoices

and letters which are evidence of the instant charge. The return of the search warrant, along with the inventory, was made by a Chula Vista police officer. (App. 9A.) On June 12, 1974, Judge Johns, after reviewing the transcript of the telephone call, as well as the tape recording of the call itself, caused both to be filed in court along with his certification. (App. 31A.)

Subsequent to the defendant's indictment in this case, he filed, pursuant to Rule 41, F.R.Crim.P., a motion to suppress all property that had been seized on June 11, 1974, from the premises located at 53 East Shasta, Chula Vista, California. The defendant set forth ten separate grounds in support of his motion to suppress. However, it was agreed that certain preliminary legal issues would be briefed and argued by the parties, namely, the defendant's claim that the warrant issued was not supported by oath or affirmation; the defendant's claim that the warrant was issued under authority of a California statute which violates the United States Constitution; and the defendant's claim that the warrant was not signed by a disinterested magistrate prior to its issuance or execution.

The decision of the court below was limited to a finding that the warrant in question was not signed in accordance with the requirements of California law, and that this defect requires suppression of all evidence seized pursuant to the warrant.

ARGUMENT

POINT I

California Courts Would Not Suppress The Evidence In This Case.

Judge Zampano's decision in the opinion below is based solely on the conclusion that California courts would suppress the evidence in this case because of a failure strictly to observe statutory requirements for telephonic search warrants. This conclusion overlooks the teaching of the closest California precedent and ignores the California courts' commonsense approach to clerical errors in warrants.

This warrant was issued by means of a telephonic search warrant procedure, in accordance with CALIFORNIA PENAL CODE §§ 1526(b), 1528(b) (West's Supp. 1976). "The California statute authorizing telephonic search warrants was compiled with in all respects"—except for one. Opinion at 3. CAL. PENAL CODE § 1528(b) provides that "[t]he magistrate may orally authorize a peace officer to sign the magistrate's name on a duplicate original warrant." After Judge Johns had satisfied himself that probable cause did exist, he authorized the signing of his name to a duplicate original warrant. Quite naturally, however, he directed this authorization to the agent whose voice he had last heard; i.e., to Seth Nadel, a Special Agent of the United States Customs Agency Service. Thus, the federal officer, who is not explicitly included in the California statutory definition of "peace officer" (*see* CAL. PENAL CODE § 830 *et seq.*), signed the magistrate's name to the warrant. Had Judge Johns instead asked one of the local police officers then present in the Chula Vista police station (unquestion-

ably, a "peace officer," *see* CAL. PENAL CODE § 830.1), the statutory provisions would have been fully complied with. Because the judge directed a federal rather than a state officer to sign his name to the warrant, the court below excluded the evidence.

Such a technical error would not result in suppression in California. The case closest in point is *Sternberg* v. *Superior Court for the County of Solano*, 41 Cal. App. 3d 281, 115 Cal. Rptr. 893 (1974). In that case, the magistrate's error was far more egregious than the error here criticized: the magistrate in that case neglected entirely to sign his name to the warrant. An unsigned warrant, needless to say, falls far short of the California requirements. CAL. PENAL CODE, §§ 1523, 1528 (West's 1970 & Supp. 1976). Yet the court, in reviewing the sufficiency of the warrant, did not declare the warrant invalid. Rather, the court held that any insufficiency on the face of the search warrant resulting from inadvertent failure of the judge to sign it was cured by his subsequent signature affixed at the earliest opportunity after the discovery of the omission and prior to any challenge to the warrant. The court's holding is based on a practical analysis of the reasons for requiring a magistrate's signature on a warrant. A magistrate's signature attests to the fact that a judicial officer has carefully determined that probable cause for a search exists; in *Sternberg*, there was no contention that the magistrate had not done so. A magistrate's signature informs the householder that a search has been validly authorized; in *Sternberg*, though the police had exhibited the unsigned warrant to the defendant and to a resident of the searched premises, neither had challenged the lack of a magistrate's signature. "No one's position was changed in reliance on the omission of the signature and the defect was promtply cured." *Id.* at 291-92, 115 Cal. Rptr. at 900. Indeed, the court went so far as to decide that the

evidence seized would not be excluded even if the warrant were insufficient on its face and uncorrectable after the actual search and seizure. *Id.* at 292-94, 115 Cal. Rptr. 900-01.

Sternberg's similarities to the present case are striking. As in *Sternberg*, there is here no contention that the judge did not carefully weigh the information presented to him, determine that probable cause existed, and decided to issue the warrant. The transcribed telephone conversation provides ample evidence of the judge's care in exercising his discretion. In *Sternberg*, the police exhibited the unsigned warrant to the defendant and a resident of the premises to be searched; neither challenged the warrant's lack of a signature. In this case, there is no contention that the police had to exhibit the warrant to anyone, for the defendant had been placed under arrest and was in custody when the search took place. App. 22A, 27A. In *Sternberg*, the magistrate's affixing his signature to the warrant after the search and before any challenge cured the warrant's defects; in this case, the magistrate signed an original warrant at the time of issuance, then signed the police officers' duplicate original—which had not been challenged—on the next day. If the California courts did not suppress in *Sternberg*, in which an unsigned warrant was exhibited but not challenged, they would certainly not suppress in this case, in which the warrant, signed by authority of a magistrate, was not even shown to the defendant.

The court's decision in *Sternberg* is but one of a long line of cases in which California courts have refused to suppress because of technical defects in a warrant, where the defect was harmless to the defendant. *See Tidwell* v. *Superior Court*, 17 Cal. App. 3d 780, 786-87, 95 Cal. Rptr. 213, 216-17 (1971) (nighttime search would not be invalidated, though not specifically authorized by warrant,

where premises searched were unoccupied); *id.* at 787, 95 Cal. Rptr. at 217 ("mistaken address does not invalidate a warrant per se"); *People* v. *Moore*, 31 Cal. App. 3d 919, 927, 107 Cal. Rptr. 590, 596 (1973) (magistrate's clerical error in use of preprinted warrant form resulted in ambiguity but was not grounds for suppression); *Hart* v. *Superior Court*, 21 Cal. App. 3d 496, 499-504, 98 Cal. Rptr. 565, 567-71 (1971) (failure of officer to announce authority and purpose before forcing entry, as required by statute, would not result in suppression where premises were unoccupied). California courts employ the same commonsense approach to harmless, mechanical errors in a warrant that this Circuit has championed; indeed, the reasoning of *United States* v. *Ravich*, 421 F.2d 1196 (2d Cir.), *cert. denied*, 400 U.S. 834 (1970), was set forth in *Tidwell* v. *Superior Court*, *supra*, and *People* v. *Moore*, *supra*, with wholehearted approval.

That the hand of the federal agent rather than that of a nearby local police officer signed the magistrate's name to this warrant is a trifling procedural error, made in good faith, which resulted in no harm to the defendant. For Judge Zampano to exclude evidence because of this harmless error is to hold police officers to a standard of perfection which even trial judges need not attain. This decision to suppress does not "compel respect for the constitutional [in this case, statutory] guarantee in the only effective available way." *Elkins* v. *United States*, 364 U.S. 206, 217 (1960). Rather it encourages police to perform their duties in such a way as to avoid entirely the traps and snares attendant upon obtaining a search warrant.[1]

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[1] Compare those federal cases which have considered minor irregularities in search warrants. E.g., *United States* v. *Romano*, 203 F. Supp. 27 (D. Conn. 1962), *rev'd in part, aff'd in part*, 330 F.2d 566 (2d Cir. 1974), *cert. denied*, 380 U.S. 942 (1965);

[Footnote continued on following page]

POINT II

Even If California Courts Would Exclude The Evidence In This Case, Federal Courts Should Not Do Likewise.

A. The Decision Below Ignores The Exclusionary Rule Standards For Joint Federal-State Searches Set Forth For This Circuit By *United States* v. *Burke*

Although the warrant in this case was issued by a state judge to state peace officers on a state form directing a search for evidence to be used in a state prosecution for violation of state law, a federal officer did "ha[ve] a hand in it." *Navarro* v. *United States*, 400 F.2d 315, 317 (5th Cir. 1968) (quoting Mr. Justice Frankfurter's opinion in *Lustig* v. *United States*, 338 U.S. 74, 78 (1949)). The overwhelming weight of precedent compels the conclusion that a predominantly state search is "federal" if a federal officer participated, as did Agent Nadel here, in the investigation, application for warrant, and subsequent search. *See, e.g., Byars* v. *United States*, 273 U.S. 28, 32 (1927); and *Lustig* v. *United States*, *supra*, 338 U.S. at 78-79 (both cases decided before the exclusionary rule could be used by federal courts against the unconstitutional conduct of participating state searchers); *United States* v. *Harring-*

United States v. *Averell*, 296 F. Supp. 1004 (E.D.N.Y. 1969); *cf. United States* v. *Longfellow*, 406 F.2d 415 (4th Cir. 1969), *cert. denied*, 394 U.S. 998 (1969). In cases where an improper return of the search warrant has been made, courts have held that this is a ministerial act, and, absent a strong showing of prejudice, no suppression will result. E.g., *United States* v. *Haskins*, 345 F.2d 111 (6th Cir. 1965); *United States* v. *Hall*, 505 F.2d 961, 964 (3d Cir. 1974).

ton, 504 F.2d 130, 133 (7th Cir. 1974); *United States* v. *Sellers*, 483 F.2d 37, 42 (5th Cir. 1973), *cert. denied*, 417 U.S. 908 (1974); *United States* v. *Navarro*, *supra*, 400 F.2d at 316-18. *But see United States* v. *Bedford*, 519 F.2d 650, 654 n.1 (3d Cir. 1975); *United States* v. *Johnson*, 451 F.2d 1321, 1322 (4th Cir. 1971), *cert. denied*, 405 U.S. 1010 (1972); *United States* v. *Coronna*, 420 F.2d 1091, 1092-93 (5th Cir. 1970).

Whether a search is characterized as "state" or "federal," the question of whether the exclusionary rule should be applied in federal prosecutions is a question of federal law, to be determined by federal standards. *Ker* v. *California*, 374 U.S. 23, 31-32 (1963); *Elkins* v. *United States*, 364 U.S. 206, 224 (1960). Even had this been a purely "state" search, a failure to follow state statutory procedure would not trigger the exclusionary rule in a federal prosecution, unless there had been a violation of the Fourth Amendment. *United States* v. *Dudek*, 530 F.2d 684, 690-91 (6th Cir. 1976); *United States* v. *Bedford*, 519 F.2d 650, 653-54 (3d Cir. 1975), *cert. denied*, 424 U.S. 917 (1976); *United States* v. *Scolnick*, 392 F.2d 320, 323 (3d Cir.), *cert. denied*, 392 U.S. 931 (1968); *see United States* v. *Burke*, 517 F.2d 377, 382 (2d Cir. 1975).

The federal exclusionary rule standards for joint federal-state searches are clearly set forth for this Circuit in *United States* v. *Burke*, *supra*, 517 F.2d at 385-87. The search, of course, must first meet the standards of the Fourth Amendment. The search must then be considered in light of F.R.Crim.P. 41. However, "violations of Rule 41 alone should not lead to exclusion unless (1) there was 'prejudice' in the sense that the search might not have occurred or would not have been so abrasive if the Rule had been followed, or (2) there is evidence of intentional and deliberate disregard of a provision in the Rule." *Id.* at 386-87 (footnotes omitted).

In the decision below, the court automatically triggered the exclusionary rule after finding that a detail of state statutory procedure had not been followed. The court did not inquire whether the inadvertent error of the state judge reached constitutional magnitude or whether the violation of Rule 41 was of sufficient consequence to justify invocation of the exclusionary rule. Rather, the court employed the exclusionary rule in an area where its remedial objectives could hardly be efficaciously served: that "blunt instrument," *United States* v. *Dunnings*, 425 F.2d 836, 840 (2d Cir. 1969), *cert. denied*, 397 U.S. 1002 (1970), was brought down upon the technical, good faith violation of a state statutory provision. The court's failure to apply the reasoning of *United States* v. *Burke*, *supra*, is a defect fatal to the decision below, for, as this Brief will argue, there is no evidence of "prejudice" in the sense used in *Burke*, nor is there evidence that the provisions of Rule 41 were intentionally and deliberately disregarded.

B. This Warrant Satisfied The Requirements of The Fourth Amendment

In his Memorandum to the court below, the defendant argued that California's telephonic search warrant provisions violate the Fourth Amendment because telephonic warrants are not "supported by Oath or affirmation," as required by the amendment. Judge Johns certainly went through the form of placing the affiants under oath (App. 14A), but defendant contends that oaths may not be administered over the telephone.

It is true, as defendant states, that the majority of American jurisdictions hold telephonic oaths invalid. *See* Annotations, 12 A.L.R. 538 (1921), 58 A.L.R. 604 (1929). A minority recognizes the validity of telephonic

oaths. *McKnight* v. *State Land Board*, 14 Utah 2d 238, 248-49, 381 P.2d 726, 733-34 (1963); *Kuhn* v. *St. Joseph*, 324 S.W. 353 (Mo. App. 1921). Whatever the common law or statutory provisions governing oaths in other jurisdictions, California quite clearly has sanctioned telephonic oaths in its Penal Code, Section 1526(b) (West's Supp. 1976). California courts, courts of other jurisdictions, and commentators have upheld the validity of telephonic oaths and the constitutionality of the statutory telephonic warrant procedure. *People* v. *Peck*, 38 Cal. App. 3d 993, 998-1000, 113 Cal. Rptr. 806, 809-10 (1974); *Bowyer* v. *Superior Court*, 37 Cal. App. 3d 151, 111 Cal. Rptr. 628, 635, *case declared moot but decision allowed to stand*, 112 Cal. Rptr. 266 (1974); *People* v. *Aguirre*, 26 Cal. App. 3d Supp. 7, 103 Cal. Rptr. 153, 155-57 (1972); *State* v. *Boniface*, 26 Ariz. App. 118, 546 P.2d 843, 846 (1976); Israel, *Legislative Regulation of Searches and Seizures: The Michigan Proposals*, 73 MICH. L. REV. 221, 258-63, 303-04; *see generally*, Note, *Oral Search Warrants: A New Standard Of Warrant Availability*, 21 U.C.L.A.L. REV. 691 (1974).

The contention that oaths dissolve on contact with telephones approaches the level of mysticism; it is reminiscent of arguments from a bygone era, of disputes such as "may a Chinese take an oath on the Bible?" *See The Merrimac*, 17 Fed. Cas. 120 (No. 9474, S.D.N.Y. 1867) (he may). An oath is simply "an affirmation of the truth of a statement [which] renders liable to punishment for perjury one who willfully asserts that which is not true." *United States* v. *Klink*, 3 F. Supp. 208, 210 (D. Wyo. 1933). When the affiants swore to Judge Johns that the information they were about to give was the truth, the whole truth, and nothing but the truth, so help them God, they rendered themselves liable to the perjury laws of California—even though their oaths were

telephonically transmitted. As for the more stringent penalties of the hereafter, there is no indication that the severity of that punishment is affected whether the oath is sworn in the presence of a dozen bishops, over the telephone to a single magistrate, or—like Scarlett O'Hara's —on a solitary potato field.

The Supreme Court, on April 26, 1976, transmitted to the Congress an amendment to Rule 41(c) which would authorize a United States Magistrate to issue a search warrant upon the sworn oral testimony of a person not physically in his presence. The statement of the person making the sworn oral testimony is deemed an affidavit for purposes of the rule. The procedure set forth in the proposed amendment very closely parallels the California procedure. *See* 96 S. Ct., Adv. Sheet No. 15, at 4-5 (June 1, 1976). The effective date of these amendments has been delayed until August 1, 1977. P.L. 94-349, 90 Stat. 822 (94th Cong., 2d Sess., July 8, 1976). The Supreme Court's sponsorship of a federal procedure almost identical to California's telephonic search warrant procedure provides firm support for the constitutionality of the California procedure.

The warrant, then, based on ample probable cause (App. 14A-26A), describing the place to be searched and things to be seized with great particularity (App. 8A), and supported by oaths that would have subjected the affiants to state perjury prosecutions if they had here lied, satisfied the requirements of the Fourth Amendment.

C. This Warrant Satisfied The Requirements Of F.R. Crim.P. 41

In the court below, defendant argued that the requirements of F.R.Crim.P. 41(c) are violated in two

respects by telephonic search warrants. First, defendant claimed that such warrants are not issued "on an affidavit or affidavits sworn to before the . . . state judge." Second, he claimed that though the rule provides that a state judge "shall issue a warrant," the California procedure allows a state judge, satisfied that a warrant should issue, to delegate the affixing of his signature onto a duplicate original warrant. Defendant argues that, under the California procedure, a state judge does not truly "issue a warrant."

The Government submits that the California telephonic warrant procedure does not violate Rule 41(c); that even if the California procedure, juxtaposed against Rule 41(c), does cause friction, minor violations of Rule 41(c) should not lead to exclusion; and that the telephonic search warrant procedure—with its enormous benefits both to the security of our homes and to efficient policing of our nation—should not be denied to joint federal-state investigations in those jurisdictions which permit the procedure.

The defendant contends that the word "before" in the Rule 41(c) phrase "an affidavit or affidavits sworn to before the . . . state judge" means "in the physical presence of." The Rule, claims defendant, requires that affidavits be sworn to only in the physical presence of the judge. The Government submits that this is a harsh, strained and unjustified reading of the word "before." The word is simply a connector, joining the swearing and the state judge: "before" imports nothing more than would the preposition "to," a preposition which could not be used in the phrase because its use would have resulted in awkwardness.

Nothing in the history of Rule 41(c) indicates that "before" was intended to have the limited meaning of "in the physical presence of." Rather, it seems simply

not to have occurred to the framers of the Rule that a state might authorize oaths *to* a judge, but outside his physical presence. The Rule was drafted as a restatement of existing law. *See* Notes of Advisory Committee on Rules, set forth in 18 U.S.C.A. Rule 41 (1976). Existing law provided that:

> [t]he judge or commissioner must, before issuing the warrant, examine on oath the complainant and any witness he may produce, and require their affidavits or take their depositions in writing and cause them to be subscribed by the parties making them.

18 U.S.C. Section 614 (1940). The former statute does not mention physical presence: if a state had permitted (as California now does and as F.R.Crim.P. 41(c)(2) may in the future, *see supra* Section IIB) telephonic oaths and examinations, tape recorded affidavits, and oral subscriptions to affidavits, the former statute would have been satisfied. Judicial decisions construing Rule 41(c) have not limited the meaning of "before" to "in the physical presence of." In *United States* v. *Mitchell*, 274 Fed. 128 (N.D. Cal. 1921), a district court held that a commissioner could not amend a warrant by telephone —a sensible holding, since in 1921 no statute authorized telephonic warrant alterations. Since swearing out an affidavit to a judge without being in the judge's physical presence is a recent development, no court seems to have been called upon to construe the meaning of "before" in Rule 41(c).

In certain circumstances, "before" quite obviously means "in the physical presence of." See *In Re Murphy*, 321 Mass. 206, 214, 72 N.E. 2d 413, 488 (1947), and cases there cited. But "before" may also mean "[o]pen to the knowledge of, displayed to or brought under the conscious knowledge or attention of." 1 OXFORD ENGLISH

DICTIONARY 763 (1961 ed.). It is in this sense, for example, that "before" is used in 18 U.S.C.A. Section 203 (Supp. 1976) ("any proceeding, application, request for a ruling . . . before any department, agency, [etc.]"). And it is in this sense that the challenged affidavits were sworn to before Judge Johns. The judge administered the oath, heard the testimony of the affiants, questioned the affiants himself. The testimony was recorded and later transcribed. Even though Judge Johns could not see these affidavits, they were quite clearly under his conscious knowledge and attention.

Defendant's claim that Judge Johns did not "issue" this warrant may be disposed of more quickly. The judge clearly heard the testimony, decided that probable cause existed, and decided to issue the warrant. He signed the original warrant, and directed Special Agent Nadel to affix the judge's signature to a duplicate original warrant. Special Agent Nadel did not thereby become the issuer of the warrant. Special Agent Nadel acted under the judge's direction in performing a mere clerical task: the judge himself was the issuer of the warrant.

Assuming, arguendo, that this Court finds that a conflict does exist between the words of CAL. PENAL CODE, Sections 1526(b), 1528(b) and F.R.Crim.P. 41(c), the Court must then measure the degree of conflict by using the analytical tools developed in *United States* v. *Burke*, 517 F.2d 377 (2d Cir. 1975). *Burke* dictates that "violations of Rule 41 alone should not lead to exclusion unless (1) there was 'prejudice' in the sense that the search might not have occurred or would not have been so abrasive if the Rule had been followed, or (2) there is evidence of intentional and deliberate disregard of a provision in the Rule." *Id.* at 386-87.

There was here no " 'prejudice' in the sense that the search might not have occurred or would not have been

so abrasive if the Rule had been followed." It is true that had the federal special agent and the California special operative made a nocturnal call on Judge Johns at home, the judge might have been able to observe the demeanor of the agents as they swore out their affidavits. The reliability of such demeanor evidence is highly speculative: experienced police officers, whose interest is purely professional, tend to be poker-faced while testifying; cross-examination, Wigmore's "great engine" for the discovery of truth (and for the disturbing of composure), does not take place in *ex parte* applications; and demeanor evidence may be inherently unreliable. After all, "[a] restless manner is simply a restless manner. Hesitation indicates, as often as not, an effort to be accurate." Blatt, *He Saw The Witnesses*, 38 J. AM. JUD. SOC'Y. 86, 86 (1954).

It is very likely that, had F.R.Cr.P. 41(c) been followed, the judge would have been deprived of all opportunity to observe the affiants' demeanor. The rule accepts affidavits based on hearsay. The investigating agents might have conveyed their report by telephone or radio to an officer near Judge Johns' home. That officer then could have conveyed the investigating agents' hearsay testimony to the judge. Judge Johns thus would have lost the opportunity to question both officers, an opportunity he used during their telephonic testimony.

In short, there is no reason to believe that the search might not have occurred or would have been less abrasive had Judge Johns been able to observe the demeanor of the officers.

Nor is there any evidence of intentional and deliberate disregard of a provision of Rule 41(c). This is not a case where federal agents purposefully sought out

a state judge in order to avoid some requirement of Rule 41(c). Rather, it is a case in which state agents investigated and arrested a defendant for violations of a state statute, then obtained a state search warrant from a state judge according to state procedure. Special Agent Nadel aided in the investigation, testified as an affiant, and accompanied the state agents on their search. He acquiesced in the state officers' obtaining of a state warrant in what was a predominantly state investigation: to insist upon a federal warrant in such circumstances would have been overbearing. His understandable acquiescence could hardly be characterized as an "intentional and deliberate disregard" of the provisions of Rule 41(c).

California's telephonic warrant procedure offers enormous benefits: this Court should not, by ruling the procedure incompatible with F.R.Crim.P. deprive joint federal-state investigations of those benefits. Exigent circumstances such as a danger that evidence will be destroyed sometimes provoke police into warrantless searches, and such searches are sometimes upheld. *See, e.g., United States* v. *Pino*, 431 F.2d 1043 (2d Cir. 1970), *cert. denied*, 402 U.S. 989 (1971). In the present case, in fact, Special Agent Nadel feared that defendant's imminent release from bail would allow him to destroy evidence. The telephonic search warrant procedure allows a disinterested judicial officer to determine whether probable cause exists in many situations in which an officer might formerly have conducted a warrantless search.

Police sometimes make warrantless searches where evidence is only arguably in plain view, and such searches have also been upheld. *See, e.g., United States* v. *Candella*, 469 F.2d 173, 175 (2d Cir. 1972). The telephonic warrant procedure may make available judicial super-

vision of searches and seizures in many such situations. Sometimes, too, while preparing to search, police discover a slight variance in a warrant's description of the place to be searched or the persons or things to be seized. *See, e.g., United States* v. *Campanile*, 516 F.2d 288, 291 (2d Cir. 1975). The telephonic warrant procedure permits modification of such warrants under judicial supervision.

In short, by using the telephonic search warrant procedure, a disinterested judicial officer may rule in situations in which a police officer formerly would have acted on his own. The procedure strengthens the safeguards of the Fourth Amendment by encouraging police to seek warrants in those emergency and borderline situations in which a warrantless search may arguably be justified. The procedure allows for judicial resolution of difficult police decisions long before a warrantless search results in a motion to suppress. The Court should encourage this strengthening of Fourth Amendment safeguards by declaring that California's telephonic search warrant procedure does not violate the requirements of Rule 41(c).

The Government, therefore, submits that there was no prejudice to the defendant by reason of the use of the telephonic search warrant, nor is there evidence of an intentional disregard of Rule 41. Accordingly, under the teaching of *United States* v. *Burke*, *supra*, the evidence seized should not be subject to the federal exclusionary rule.

CONCLUSION

For all the foregoing reasons, the Court below erred in suppressing the evidence in this case. The judgment below should be reversed.

Respectfully submitted,

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United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 76-1518

U S A,

APPELLANT

vs.

WILLIAM TURNER,

APPELLEE

AFFIDAVIT OF SERVICE BY MAIL

Patricia D. O'Hara, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 51 West 70th Street, New York, New York 10023

That on the 17th day of December, 1976, deponent served the within Brief & Appendix

upon Robert Oliver, Esq., 205 Church Street, New Haven, Connecticut 06510

Attorney(s) for the Appellee in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Patricia D. O'Hara

Sworn to before me,

This 17th day of December 1976

Edward A Quimby

EDWARD A. QUIMBY
Notary Public, State of New York
No. 24-3183500
Qualified in Kings County
Commission Expires March 30, 1977